

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1483

To be argued by
JEFFREY I. GLEKEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1483

UNITED STATES OF AMERICA,

Appellee,

—v.—

EDMUND A. ROSNER,

Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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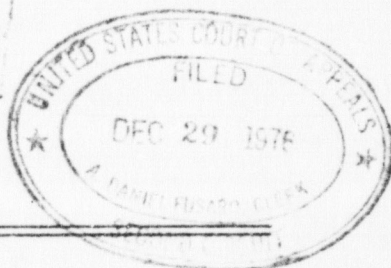


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EDMUND A. ROSNER,

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Edmund A. Rosner appeals from an order entered in the United States District Court for the Southern District of New York on October 1, 1976, by the Honorable Inzer B. Wyatt, United States District Judge, denying Rosner's motion to vacate a sentence imposed upon him by Judge Wyatt on August 16, 1974.

On December 5, 1972, after an eleven day trial before the Honorable Arnold Bauman, United States District Judge, and a jury, Rosner was found guilty of conspiracy, obstruction of justice, and three counts of bribery. After hearings on two separate motions for a new trial, Rosner was sentenced on March 20, 1973, to concurrent terms of five years imprisonment. On September 26, 1973, the conviction was affirmed, but the

sentence was vacated and the case was remanded * for resentencing. *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973). On March 20, 1974, while his petition for certiorari was pending in the Supreme Court, Rosner moved in the District Court for a new trial based on newly discovered evidence that the principal Government witness against him had lied about the extent of his own prior criminal activities. On June 10, 1974, the Supreme Court denied Rosner's application for a writ of certiorari without prejudice to the District Court's consideration of the motion for a new trial. 417 U.S. 950. Judge Bauman held hearings on the new trial motion in July 1974, and on August 15, 1974, denied the motion in an unreported opinion. On August 16, 1974, Judge Wyatt, to whom the case had been reassigned, imposed concurrent sentences of three years imprisonment on each count. No appeal was ever taken from that sentence. However, Rosner did appeal the denial of his motion for a new trial, which was affirmed in April 1975. *United States v. Rosner*, 516 F.2d 269 (2d Cir. 1975). On June 30, 1976, the Supreme Court denied Rosner's petition for certiorari in connection with the new trial motion. 44 U.S.L.W. 3756. Rosner moved on August 27, 1976, for a reduction of sentence pursuant to Fed. R. Crim. P. 35. This was denied on September 3. On September 27, 1976, Rosner filed this motion to vacate Judge Wyatt's sentence. Judge Wyatt denied this motion on October 1 as "utterly lacking in merit." On November 29, 1976, the Supreme Court denied Rosner's petition for rehearing of the denial of his petition for certiorari. 45 U.S.L.W. 3401.

Rosner remained at liberty, pursuant to orders of this Court, pending disposition of his petition for cer-

* However, the mandate did not issue to the District Court pending Rosner's petition for certiorari.

tiorari from the affirmance of the denial of his new trial motion and, subsequent to its denial, his petition for rehearing. His surrender has been scheduled for January 13, 1976.

ARGUMENT

Rosner's Sentence Was Legally Imposed.

Rosner claims that the sentence imposed on him by Judge Wyatt is invalid because he gave consideration to the sentence previously imposed by Judge Bauman. He attempts to analogize this to situations in which judges relied upon misinformation, such as an inaccurate criminal record, *Townsend v. Burke*, 334 U.S. 736 (1948), or an illegal conviction, *United States v. Tucker*, 404 U.S. 443 (1972). An analysis of what actually occurred, however, reveals that Rosner's claim is totally devoid of merit.

In *United States v. Rosner*, *supra*, 485 F.2d 1213, 1229-31, this Court remanded for resentencing upon the grounds that the proceedings in the District Court failed to comply fully with Fed. R. Crim. P. 32(a), which provides that a defendant may "present any information in mitigation of punishment." Specifically, this Court found that Rosner had had insufficient time to respond to a memorandum submitted to the District Court by the Government but not disclosed to him until the day of his sentence. It did not rule that the memorandum contained misinformation and explicitly rejected the suggestion that the memorandum should not have been considered by the sentencing judge. 485 F.2d at 1231 n. 27. The holding was only that Rosner had not been given enough time to respond to the contents of the memorandum.

After the case was reassigned to Judge Wyatt for resentencing, the Government filed a new sentencing memorandum on November 27, 1973,* to which Rosner responded by memorandum on August 15, 1974, the day before his resentencing. (A. 14-15).** At the resentencing, Judge Wyatt stated that he was considering the opinion of the Court of Appeals remanding the case for resentencing, pre-sentence reports prepared by the Probation Department, the memoranda submitted to him by the Government and Rosner, and the minutes of the sentencing proceedings before Judge Bauman. (A. 14-15). Judge Wyatt explicitly declined to consider several incidents involving Rosner that were set forth in the memorandum filed by the Government and to which Rosner objected. (A. 26).

Rosner's sole objection to the sentencing procedure derives from the following remarks made by Judge Wyatt during the course of imposing sentence:

"I have taken into account, as a factor, Judge Bauman's sentence and I disagree with Mr. Der-showitz' memorandum that no weight whatever can be given to Judge Bauman's sentence.

I believe that Judge Bauman's sentence is one of the many factors to be considered, properly to be considered by me in arriving independently at a sentence now to be imposed.

I consider Judge Bauman one of the ablest judges to have graced this court and I have for

* This was not the memorandum submitted to Judge Bauman. The original sentencing memorandum was not resubmitted to Judge Wyatt.

** The sentencing minutes have been reproduced in Rosner's appendix and references thereto are abbreviated herein as "A".

him the highest respect, but I have reached independently—now that I have heard finally the submissions this afternoon, I have reached independently a conclusion as to sentence.

I find, as might have been expected, that I agree with Judge Bauman as to the seriousness of the offenses and that imprisonment is required.

Taking into account that Mr. Rosner, the defendant, has lost, and if the conviction becomes or is final, will irrevocably lose his license to practice law, and taking all the other factors to which Mr. Dershowitz has directed my attention in the memorandum and this afternoon, I do disagree with Judge Bauman as to the length of imprisonment which should be required.

And as long as there are differences between human beings, there are going to be sentencing differences between judges.

On Counts 1, 2, 6, 7 and 8, the defendant is committed to the custody of the Attorney General or his authorized representative, for three years. The sentence is to run concurrently." (A. 26-27).

Rosner's claim that this reference to Judge Bauman's initial sentence constituted reliance upon misinformation is thus conclusively rebutted by the record. Judge Wyatt emphasized that he was exercising his own independent judgment, which was reflected, of course, by the fact that he reduced Judge Bauman's sentence from five years to three. Moreover, it is clear from the record that Judge Wyatt's reference to Judge Bauman's sentence consisted of no more than consideration of Judge Bauman's views concerning the seriousness of Rosner's crimes. Judge Wyatt explicitly stated that he agreed "with Judge Bauman as to the seriousness of the offenses. . . ."

(A. 27). It approaches the absurd to contend, totally without support in the record, that Judge Wyatt, after stating that he had reviewed the decision of the Court of Appeals, was unaware that Judge Bauman's sentence was procedurally defective to the extent that Judge Bauman relied upon a Government sentencing memorandum which Rosner did not have sufficient opportunity to answer. Rather than repeating the error made by Judge Bauman, Judge Wyatt considered only materials to which Rosner had a full opportunity to respond—and, indeed, he explicitly stated that he rejected much of that material. Since it is settled law that this Court will not look behind the stated basis of an otherwise legal sentence imposed by a District Court, *United States v. Armedo-Sarmiento*, Dkt. No. 76-1113, slip op. 305, 320 (2d Cir., Oct. 28, 1976); *United States v. Herndon*, 525 F.2d 208, 210 (2d Cir. 1975), and in particular will not probe a District Court's statement of what it did *not* consider, *United States v. Herman*, 524 F.2d 1103 (2d Cir. 1975), Rosner's claim is frivolous.

Finally, even if Judge Wyatt failed to discount Judge Bauman's sentence to the extent that it may have been predicated upon information which Rosner did not have adequate opportunity to rebut—which, we repeat, is an utterly untenable assumption—this would not affect the validity of his sentence. Indeed, if he had chosen, it would have been perfectly proper for Judge Wyatt to have relied upon the memorandum submitted by the Government to Judge Bauman. The case was not remanded for resentencing because Judge Bauman relied upon misinformation, but because Rosner did not have sufficient time to respond to the information contained in the memorandum. By the time of the resentencing, Rosner had had over a year to examine the memorandum. If he seriously interpreted Judge Wyatt's remarks as meaning that he was considering, either directly or

indirectly, the original sentencing memorandum, Rosner had a full opportunity to respond to it. Even if Judge Wyatt's reference to Judge Bauman's sentence surprised Rosner,* he could have requested an adjournment in order to prepare a response. Thus Rosner was not deprived of any right afforded by Rule 32(a). In fact, the only conclusion to be drawn from Rosner's failure to pursue either of these alternatives was that he fully understood that in referring to the prior sentence Judge Wyatt was only considering Judge Bauman's views concerning the seriousness of Rosner's crimes.**

* Rosner can hardly claim surprise, because in his sentencing memorandum submitted to Judge Wyatt he had complained that "the Government asks this Court to give weight to the conclusions expressed by Judge Bauman at the prior sentencing. . . ." (A. 51).

** Rosner is also critical of remarks made by Judge Wyatt in denying Rosner's present motion. Brief at 9, 4-5. Judge Wyatt's remarks were, however, both appropriate and restrained under the circumstances. Over four years have passed since Rosner's conviction, and he still has not served a day in jail. Although Judge Wyatt resentenced him in August 1974, Rosner did not challenge the legality of his sentence until over two years later. Despite the fact that Rosner appealed from Judge Bauman's denial of his new trial motion, rendered one day prior to his resentencing, Rosner chose not to appeal the legality of his sentence at that time. Under those circumstances, given the attenuated nature of Rosner's claim, it was apparent to Judge Wyatt—and should be apparent to this Court—that this motion was but another episode in Rosner's efforts to postpone serving his sentence indefinitely and to make "a mockery of Federal criminal justice." *United States v. Parness*, 536 F.2d 474, 475 (2d Cir. 1976). Indeed, Rosner's delay in asserting his present claim casts serious doubt upon his good faith in raising it. See *Parker v. United States*, 358 F.2d 50, 54 n. 4 (7th Cir. 1965), cert. denied, 386 U.S. 916 (1967); *Kelley v. United States*, 299 F. Supp. 1367, 1371 (S.D. N.Y. 1969); *Rakes v. United States*, 231 F. Supp. 812, 817 (W.D. Va. 1964), aff'd., 352 F.2d 518 (4th Cir. 1965). See also *Seiller v. United States*, Dkt. No. 75-2002, slip op. 6509, 6536 (2d Cir., Dec. 1, 1975).

CONCLUSION

The District Court's Order Should Be Affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JEFFREY I. GLEKEL being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 29th day of December, 1976,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

ALAN M. DERSHOWITZ, Esq.
41 CONCORD AVENUE
CAMBRIDGE, MASSACHUSETTS 02138

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Jeffrey I. Glekel

Sworn to before me this

29th day of December, 1976
Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978